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EX PARTE

William F. Maher, Chief, Wireline Competition Bureau
Federal Communications Commission
The Portals, 445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: **CC Docket No. 01-338**
Wireless Access to UNEs

Dear Mr. Maher:

This letter responds to recent ex partes filed in this proceeding by a number of Commercial Mobile Radio Service (CMRS) providers asserting entitlement to unbundled network elements in order to provide mobile wireless service. Although these recent letters provide no new factual or legal support beyond what has previously been submitted by the CMRS industry in this proceeding, BellSouth feels obligated to reply by pointing out the evidence in the record clearly supporting rejection of this position.

According to the Cellular Telecommunications Industry Association (CTIA), CMRS providers have experienced double-digit *annual* growth rates over the past decade and a half in a number of key performance indicators: reported subscribers (28.9%), estimated subscribers (39.8%), revenues (29.9%), gross investment (32.1%) and direct employment (29.4%).[1] Importantly, this growth has been accomplished *without* access to unbundled network elements. These facts alone should put to rest any argument that CMRS providers could be found "impaired" without such access.

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[1] Reply Declaration by National Economic Research Associates, Inc. ("NERA") on behalf of BellSouth Corporation, July 17, 2002, Attach. 1 to BellSouth Reply Comments (filed July 17, 2002) at 113, Table 18 (source: CTIA, *Measuring Wireless Today: CTIA's Semi-Annual Survey,* Feb. 28, 2002).

Nonetheless, CMRS providers continue to argue that they should be granted access to incumbent local exchange carrier (ILEC) unbundled network elements (UNEs) merely because they are defined as "telecommunications carriers" under the Telecommunications Act of 1996. BellSouth has demonstrated that these arguments of statutory entitlement are without merit, and that CMRS providers are not, and cannot be shown to be, "impaired" within the meaning of the Act. *See* BellSouth Comments at 46-59 (Apr. 8, 2002); BellSouth Reply Comments at 62-74 (July 17, 2002); NERA at 110-129 (relevant portions attached).

CMRS Providers Are Not "Impaired" Without Access to UNEs

This Commission has twice attempted to implement the "impairment" standard of the 1996 Act and twice been struck down by the courts for extending the availability of UNEs beyond any reasonably-constrained definition of that term. The CMRS commenters in this proceeding, however, ask the Commission to extend the impairment standard beyond what it has done before, using precisely the types of arguments rejected by the courts.

CMRS providers argue that because they are "telecommunications carriers" they are entitled to unfettered access to all UNEs for which the Commission has made an impairment determination – logic which has been soundly rejected by the United States Court of Appeals.[2] "Telecommunications carrier" status alone is insufficient to determine anything beyond *potential* eligibility for access to UNEs; a service-specific "impairment" determination is an essential prerequisite for actual access. The impairment analysis itself must be more "rigorous" than in the past and must be "judicially sound."[3] However, recent CMRS *ex parte* submissions do nothing more than define impairment as the mere difference between the "cost" of tariffed special access and the "cost" of dedicated transport UNEs. Both the Supreme Court and the United States Court of Appeals have rejected the notion of cost disparities alone establishing a sufficient basis for impairment.[4]

What the CMRS providers are actually complaining about is the difference between the profit margin they are able to obtain when CMRS transport inputs are acquired at market rates from multiple competitive facilities-based providers compared to the profit margin that can be obtained by converting special access circuits purchased from ILECs to UNEs priced at state-prescribed TELRIC rates. These carriers simply seek to leverage regulatory opportunities to obtain inputs from ILECs for their own *highly* competitive business offerings at below-cost TELRIC prices. In other words, CMRS providers are seeking to avail themselves of the same

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2 *CompTel v. FCC*, 309 F.3d 8, 13 (D. C. Cir. 2002).

3 Chairman Michael K. Powell, Competition Issues in the Telecommunications Industry, Written Statement Before the Committee on Commerce, Science and Transportation, United States Senate (Jan. 14, 2003) at 9, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-230241A1.pdf ("Powell Senate Statement").

4 *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 389-93 (1999); *USTA v. FCC*, 290 F.3d 415, 427 (D. C. Cir. 2002).

type of regulatory arbitrage this Commission has sought to deter in this area, as well as others such as reciprocal compensation.

CMRS Providers Have Not Overcome Record Evidence of Competitive Transport

Bellsouth has previously submitted to the Commission the uncontroverted economic analysis of NERA, a copy of which is attached to this written *ex parte*. The NERA economists specifically considered the claim that "CMRS Carriers are impaired without the availability of dedicated transport on a UNE basis," and the arguments in support of this claim advanced by AT&T Wireless, Nextel and Voicestream. Sprint, AT&T Wireless, and T-Mobile all recently filed *ex parte* contacts that re-argue their previous positions and provide no basis for changing current rules or making a new determination of impairment, much less overcome the evidence presented through NERA.

T-Mobile and AT&T Wireless nevertheless continue to make broad-stroke assertions that there is insufficient competition in the market for wholesale transport services—arguments that are unaccompanied by any empirical evidence or analysis. In particular, none of the CMRS commenters have even tried to explain how any reasonably-constrained definition of "impairment" could encompass carriers that have been among the greatest "success stories" in the telecommunications industry—*without UNE access*. [5] Nor do any of the CMRS commenters offer any empirical evidence to rebut the evidence put into the record of this proceeding concerning the competitive market for transport, [6] the Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport,[7] or the various BOC Pricing Flexibility Proceedings.[8] Rather, as summarized in a recent Sprint ex parte, the CMRS providers' impairment analysis is simply that: CMRS providers use lots of transport; it would be costly for a CMRS provider to build a duplicate network; and special access is more costly than UNE transport.[9] Such simplistic analysis runs directly counter to the previous court mandates.

In any event, BellSouth loses CMRS special access customers to competitive transport providers on a weekly, almost daily, basis. Prior to the NPRM that initiated this proceeding,

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[5] Indeed, a recent ex parte filed by Sprint simply asserts, without explanation, that CMRS providers' market success without UNEs should not be considered in the Commission's evaluation of "impairment." Ex parte letter from John Benedict, Senior Attorney, Sprint, dated January 10, 2003 (Attachment at p. 2) ("Growing wireless customer base doesn't mean no impairment.").

[6] 2002 UNE Fact Report, Section III (filed with BellSouth Comments, Apr. 8, 2002); UNE Rebuttal Report 2002, Section III (filed with Verizon *ex parte* Oct. 23, 2002).

[7] *See* Pleading Cycle Established for Comments on Joint Petition of BellSouth, SBC and Verizon, CC Docket No. 96-98, *Public Notice*, DA 01-911 (rel. Apr. 10, 2001).

[8] *See, e.g.*, CCB/CPD No. 00-20; WCB/Pricing No. 02-24.

[9] Ex parte letter from John Benedict, Senior Attorney, Sprint, dated January 10, 2003 (Attachment at p. 3).

BellSouth provided evidence to the Commission, in the form of market penetration maps, that demonstrates that there are numerous competitive transport alternatives available to CMRS providers.[10] It has been BellSouth's experience that its wireless special access customers continue to be especially vulnerable to competitors.[11]

It must also be noted that even the arguments CMRS providers have attempted to make to show they are impaired without access to high-capacity transport have virtually nothing to do with providing a competitive alternative to traditional ILEC residential or business voice services. The CMRS ex partes invariably include generic policy claims that allowing them access to UNEs is "good' because wireless service is becoming a substitute for ILEC wireline service. To be sure, as Chairman Powell noted in his recent Senate testimony, "the most significant competition in voice (local and long distance) has come from wireless phone service."[12] (Of course, once again, this success has been without access to UNEs.) But as made clear from T-Mobile's recent ex partes, it is the "scope and scale" of CMRS networks that requires large amounts of transport—or stated another way, it is because of the *mobile* nature of CMRS that requires deployment of "thousands of cell sites. . .over great distances. . .*to meet the demands of the mobile customer*. . ."[13] This has nothing to do with encouraging competition in the local exchange market.

Accordingly, even if CMRS carriers lacked competitive access choices—which BellSouth has shown they do not—any impairment analysis would have to balance the competitive advantages inherent in a mobile service. In addition to mobility itself, CMRS providers, like CLECS, enjoy the competitive advantage of "being free of any duty to provide under-priced service to rural and/or residential customers and thus of any need to make up the difference elsewhere."[14] The market success of wireless service clearly shows that this balance weighs heavily against any finding of impairment. In this regard, I would add that, to the extent the Commission does look at CMRS providers as the equivalent to CLECs in providing a competitive local service, they must also be considered in evaluating the overall competitiveness of the local market.[15]

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10 BellSouth *ex parte* filed Aug. 22, 2001 in CC Docket No. 96-98.

11 The Commission can ensure the demise of the existing competitive market for transport by mandating ILECs to provide dedicated transport to CMRS carriers as a UNE. No competing facilities-based carrier will be able to compete against a TELRIC-priced service analog.

12 Powell Senate Statement at 4.

13 Ex parte letter from Douglas Bonner, Counsel for T-Mobile USA, Inc, dated January 6, 2003, at pp.1-3 ("CMRS networks must have thousands of cell sites that are deployed to originate and terminate calls, over great distances, which in turn, must be connected to centrally located mobile switching centers.")

14 *NERA.* at 423.

15 Of course, given that there are 5-6 CMRS carriers in every major MSA with significant market penetration achieved without access to UNEs, such an analysis would necessarily lead to the elimination of all unbundled network elements.

Finally, the recent CMRS ex partes continue to urge the Commission to "clarify" that they are already entitled to UNE access because wireless cell sites or base stations are the equivalent to wireline switches. BellSouth has refuted these architectural arguments extensively in its previous filings by showing that wireless base stations do not perform the network functionalities of a circuit switch. Rather than reiterate those arguments here, I am attaching to this letter the relevant portions of our comments in this proceeding.[16] The relevant question, however, is – once again – whether CMRS providers are impaired in providing service. In this respect, the important point to take away from the CMRS ex partes is their admission that the market success they have enjoyed to date has been accomplished without access to UNEs.

Expanding UNE Access is Poor Public Policy

Of course, one of the other essential competitive advantages enjoyed by the wireless industry is minimal regulation. It is impossible to ignore the fact that the companies pushing regulatory intervention in this proceeding are the same companies continually urging the Commission to avoid imposing any LEC-type regulatory obligations on wireless carriers because regulation is inconsistent with the development of competition.

Of course, on this latter point BellSouth is in full agreement. The success of the wireless industry is in no small part attributable to nearly two decades of light-handed federal regulatory policies that freed CMRS providers from any meaningful rate regulation, including effective preemption of any state requirements that would frustrate federal policies favoring competition. This regulatory framework allowed CMRS providers to respond to competitive pressures by developing innovative and attractive products and services, including national pricing plans.[17] Indeed, in opposing the Commission's number portability mandate, AT&T Wireless has stated that "the wireless industry is a prime example of how a healthy competitive marketplace has been allowed to develop, unfettered by extensive regulation."[18] "The wireless market," AT&T Wireless observes, "is a model of vibrant facilities-based competition."[19] "Absent evidence of market failure," opined AT&T Wireless a year ago, "the Commission should not impose an additional regulatory mandate on a market that just last month Chairman Powell characterized as 'the most competitive market in the telecommunications industry."[20] Under the service-specific approach that is compelled by the appellate courts, there is simply no way that carriers competing in *the most competitive* of all telecommunications markets can show that they are impaired, as a matter of law, in their ability to provide mobile wireless service. But just as

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16 *See* BellSouth Comments, pp. 53-57; BellSouth Reply Comments, pp. 68-70 attached).

17 Powell Senate Statement, *Supra* note 1.

18 AT&T Wireless Reply Comments, WT Docket 01-184 at 3 (filed Oct. 22, 2001).

19 *Id.* at 5.

20 Letter from Suzanne K. Toller, on behalf of AT&T Wireless, to Magalie Roman Salas, FCC, WT Docket No. 01-184 at 2 ("Competitive Reasons Justifying Forbearance [from number portability requirements]") (filed Jan. 18, 2002).

importantly, the Commission should heed AT&T Wireless' statements here and not impose regulation on an existing competitive high-capacity transport market.

Conclusion

The Commission "must establish, from the ground up, the clear impairment of each and every element that it orders unbundled."[21] A well-defined "impairment" analysis is the linchpin to accessing UNEs and the Commission has never made any specific impairment determinations with respect to mobile wireless carriers

None of the recent ex parte contacts filed in this proceeding have overcome the economic and market evidence entered into the record through NERA which demonstrate that even under the standards of impairment previously adopted by the Commission, and found by the appellate courts to be overbroad, CMRS providers are not, and cannot be, impaired by the provision of ILEC transport as a special access service, rather than as a UNE.[22] Indeed, it would be impossible to find mobile carriers "impaired" in any meaningful sense given their success without UNE access.

Very truly yours,

Glenn T. Reynolds

cc: Christopher Libertelli
Matthew Brill
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21 Powell Senate Statement at 9.

22 NERA at 111, ¶ 172.